IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 173 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AZAD SODA FACTORY

Versus

STATE OF GUJARAT

Appearance:
MR J.B. PARDIWALA for MR RR MARSHALL for Petitioners
MR B.Y. MANKAD, APP for Respondent No. 1
Respondent No. 2 served

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 30/08/2001

ORAL JUDGEMENT

1. The petitioners are original accused in Criminal Case No. 58 of 1983 filed before learned Judicial Magistrate, First Class (Municipal) Court at Surat. Along with the present petitioners, there were two other accused - accused No.4 - R.K. Food Products and accused

No.5 - Pritamdas Santumal. The case was filed by the Food Inspector of Municipal Corporation against the accused person u/ss 7 and 16 of the Prevention of Food Adulteration Act. On 11th of August, 1983 from Azad Soda Factory, owned by present petitioner No.3, three sealed bottles of tomato ketchup were seized by Food Inspector, Surat Municipal Corporation. Present petitioner No.2 was original accused No.2 and was servant of present petitioner No.3 working in Azad Soda Factory. Said sealed bottles were manufactured by R.K. Food Products, accused No.4, which was owned by Pritamdas Santumal accused No.5. After necessary procedure, seized bottles were sent to Public Analyst and according to the report of Public Analyst - Exh.15 dated 20.09.1983, the said sample was not conforming with the criteria laid down by the Prevention of Food Adulteration Act and Rules. The present complaint came to be lodged against the present petitioners and other two accused on 14th October, 1983. Original accused Nos. 2, 3 and 5 i.e. present petitioners No. 2, 3 and original accused No.5 applied before the learned Judicial Magistrate, First Class, for sending the other sample bottles of tomato ketchup seized by the Food Inspector for analysis and examination to the Central Food Laboratory. The report of Central Food Laboratory, which is at Exh.3 dated 13.11.1983, reveals that the sample sent was adulterated. In the Trial Court, two witnesses were examined i.e. Complainant Food Inspector at Exh.9 and Panch witness at Exh.54 and thereafter hearing the parties, learned JMFC vide his judgment and order dated 29th March, 1995 was pleased to convict all the accused for the offences punishable u/ss 7 and 16 of the Prevention of Food Adulteration Act. Original accused Nos. 2, 3 and 5 each were ordered to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000/-. Accused No.1 Azad Soda Factory and accused No.4 R.K. Food Products were sentenced to pay a fine of Rs. 1,000/- each and in default, their Proprietors were sentenced to undergo rigorous imprisonment for two months.

2. All the original accused being aggrieved by the above said judgment of conviction, preferred Criminal Appeal No. 28 of 1995 in the Court of Addl. Sessions Judge, Surat. Addl. Sessions Judge, Surat, vide his judgment and order dated 3rd May, 1989, allowed the Appeal of original accused Nos. 4 and 5 and acquitted them on benefit of doubt. While the Appeal against original accused Nos. 1 to 3 - present petitioners herein was dismissed. It was observed qua accused No. 4 and 5 by the learned Addl. Sessions Judge that it was not proved that the sample of tomato ketchup seized, was

the product of accused Nos. 4 and 5. While according to the learned Addl. Sessions Judge, it was proved that the said sample was sold by accused Nos. 1, 2 and 3.

3. Being aggrieved and dissatisfied, original accused Nos. 1, 2 and 3 have preferred this Criminal Revision Application before this Court.

4. Learned Advocate Mr. J.B. Pardiwala for the petitioner and learned APP Mr. B.Y. Mankad for the State of Gujarat were heard. While, respondent No.2 was served but has not appeared.

5. Mainly it was contended on merits that prosecution has not proved that the sample of tomato ketchup was so adulterated as to be injurious to health. It is urged that it is not clear that whether the article falls within the ambit of S.2 (1A)(L) or S. 2(1A)(M) of the Prevention of Food Adulteration Act, 1954. It was also urged that in further statement of the accused, the contents of the Chemical Analyzer report and opinion were not specifically brought to the notice of the accused. It was also submitted that this is a very old case because the sample was obtained on 11.8.1983 and as per the report of Public Analyst, Central Food Laboratory, Exh.3, the sample was falling short by 0.24% by approved standard of the Prevention of Food Adulteration Act, 1954.

6. From the rival contentions along with the merits of the matter, the same is required to be viewed by considerations as mentioned hereinafter. Before we examine the case further, the view taken by the Apex Court in the cases like at hand, must be taken into consideration.

7. In the case of NORTAN MAL vs. STATE OF RAJSTHAN, reported in Cri. LJ 1995 2661, in a short judgment, the Apex Court was pleased to observe as under :

" Almost two decades back, on 13.8.1976, the Food Inspector purchased from the appellant Chilly powder for analysis in accordance with the Prevention of Food Adulteration Act, 1954 and the Rules framed thereunder. Under the Rules, the variables of chilly powder are provided in item A.05.05.01. Total ash permissible is not more than 8 per cent by weight. Here, according to the Public Analyst, the total ash found in the sample obtained from the appellant was 8.38 per cent by weight. There was, thus, excess of .38

per cent by weight - almost a 300th part of the substance. Not only is the variable minimal (for that alone could be no defence), but there could be a possibility of error of judgment in analysis. The functions of the Public Analyst being that of an expert, his word in that regard in the normal circumstances is to be given considerable weightage. But the same cannot be put at the pedestal of being the gospel truth. The statute has plenty of flexibility in which the Court can fish to arrive at a proper solution. The adulteration found in the instant case being marginal, the possibility of there being an error of judgment in analysis and the matter being very old, as mentioned at the outset, we think it would be unsafe to uphold the conviction of the appellant as was recorded by the High Court in reversal of that of the trial Court who had initially acquitted the appellant of the charge. In this view of the matter, we allow the appeal, set aside the conviction and sentence of the appellant and acquit him of the charge."

8. Similarly, in the matter of N. SUKUMARAN NAIR vs. FOOD INSPECTOR, MAVELIKARA, reported in 1995 CRI.L.J. 3651, in para-3 the Apex Court observed as under :

" The offence took place in the year 1984. The appellant has been awarded six months simple imprisonment and has also been ordered to pay a fine of Rs. 1000/-. Under cluase (3) of Section 433 of the Code of Criminal Procedure, `the appropriate government' is empowered to commute the sentence of simple imprisonment for fine. We think that this would be an appropriate case for commutation of sentence where almost a decade has gone by. We, therefore, direct the appellant to deposit in the trial court a sum of Rs.6000/- (sic) as fine in commutation of the sentence of six months' simple imprisonment within a period of six weeks from today and intimate to the appropriate government that such fine has been deposited. On deposit of such fine, the State Government may formalise the matter by passing appropriate orders under clause (d) of Section 433 of the Code of Criminal Procedure."

9. Lastly, referring to the above case of N. Sukumaran Nair vs. Food Inspector (supra) the Apex Court

in SANTOSH KUMAR vs. MUNICIPAL CORPORATION & ANR., reported in AIR 2000 SC 3416, observed in paras 4, 5 and 6 as under :

"4. Learned counsel for the appellant made a plea for affording the benefit which has been given to the accused in the decision of this Court, namely, N. Sukumaran Nair v. Food Inspector, Mavelikara, (1997) 9 SCC 1010 : (1995 AIR SCW 3229 : 1995 Cri. LJ 3651). The said plea is made on the premise that the offence in this case took place in the year 1983 and the food article - groundnut oil on analysis was found not to contain any foreign substance or anything injurious to health and that it was found adulterated solely on the ground that its constituents fell below the standard very marginally. To convince us of the said contention learned counsel produced a copy of the report of the Public Analyst. The result of the analysis is incorporated therein as follows :

a) B.R. reading at 40 degree C. 58.8
b) Iodine Value 100.8
c) Saponification Value 180.6
d) Free fatty acids as Oleic acid 0.3%
e) Beller test (Turbidity temp.
Acetic acid method) 23.8 C"

"5.This case seems to be almost on a parallel with the facts enumerated in the decision cited above. We are also persuaded to extend the same benefit which the appellant in the aforesaid decision was granted by this Court, as this would be an appropriate case for commutation of sentence under Clause (d) of Section 433 of the Code of Criminal Procedure."

"6. We, therefore, direct the appellant to deposit in the trial Court a sum of Rupees 10,000/- as fine in commutation of the sentence of 6 months imprisonment within a period of 6 weeks from today and intimate to the appropriate Government that such fine has been deposited. On deposit of the fine the State Government may formalise the matter by passing appropriate order under Clause (d) of Section 433 of the Code of Criminal Procedure. In the meanwhile, the appellant will remain on bail."

10. Now, if we examine the case at hand, the sample

was taken on 11.8.1983, almost before two decades. It appears that one of the accused i.e. petitioner No.3, the owner of Azad Soda Factory, according to the learned Advocate for the petitioners, is about 76 years of age. In the present case, sample of tomato ketchup was seized. Except one standard, in all remaining standards, the sample conformed with the criteria laid down by the Prevention of Food Adulteration Act, 1954 and Rules 1955. Rule of Prevention of Food Adulteration Rules, 1955 which is required to be taken into consideration is Rule A.16.06. Third Paragraph of the Rule is as under :

" Total acidity in terms of acetic acid shall be not less than 1.0 per cent and the total soluble solids w/w not less than 25 per cent. It shall not contain any other vegetable substance."

11. Now, the report, in this respect, of the Public Analyst, Central Food Laboratory, Pune, which is dated 28.10.1983, denotes that total acidity of acetic acid was found 0.74% in the sample which ought to have been 1.0% as per the norms laid down by the Prevention of Food Adulteration Rules referred to above. Meaning thereby that particular criteria in percentage was falling short only by 0.26 per cent. In all other respects, the sample was conforming with the criteria as laid down by the Act and Rules. Therefore, the Public Analyst opined that the sample was adulterated. As laid down by the Apex Court in the above case of Santosh Kumar v. Municipal Corporation (supra), in this case also since the sample was falling short only by 0.26% of the criteria as laid down by the Prevention of Food Adulteration Act, it could be safely said that there may be a possibility of error of judgment in analysis. Although, the word of Public Analyst as being expert, in normal circumstances must be given considerable weightage. But the same cannot be put at the pedestal of being the gospel truth. In this case, the adulteration found was extremely marginal and there was the possibility of an error of judgment in analysis. Not only that the present case is not of adding of foreign substance in the consumable food but the case is only of not conforming with the standard by marginal difference of 0.26%.

12. Not only that the prosecution in this particular case is not able to prove whether this marginal difference would be injurious to health in consumable food which is tomato ketchup.

13. Having considered all these peculiar circumstances of the case and since the accused i.e. the

present petitioners have already paid the fine, this is an appropriate and fit case wherein the State Government can be directed to formalise the matter by passing appropriate order under Clause (c) of Section 433 of the Code of Criminal Procedure Code only in respect of commutation of sentence of imprisonment. In this view of the matter, the following order is passed :

" Revision is partly allowed and the order of the learned JMFC as well as learned Addl. Sessions Judge is revised to the extent that since each of the petitioner herein had deposited the amount of fine of Rs.1,000/- each, this part of fine is not interfered with. The State Government is directed to formalise the matter by passing appropriate order under Clause (c) of Section 433 of the Code of Criminal Procedure for commutation of sentence only of imprisonment awarded to each of the petitioners within six months from the date of the intimation to the State Government. In the meanwhile, the present petitioners will remain on bail as per the orders passed by this Court on 5th May, 1989. Rule is made absolute to that extent."

(J.R. Vora, J.)

p.n.nair